In the

United States Court of Appeals

For the Ninth Circuit

ESTATE OF GRACE N. WILLIAMS,
Deceased,
Ralph E. Williams, Executor, *Petitioner,*

v.

COMMISSIONER OF INTERNAL
REVENUE, *Respondent.*

NO. 15503

REPLY BRIEF FOR PETITIONER

ON PETITION FOR REVIEW OF DECISION OF THE TAX COURT OF THE UNITED STATES

CLARENCE P. LeMIRE, JUDGE

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INTRODUCTION

The Respondent's brief (as does the opinion of The Tax Court of the United States) contains a basic misstatement of fact without which neither the opinion of the Tax Court nor the contentions of the Respondent can be supported.

Respondent includes in this statement the following (Br. 8): ". . . He (Ralph E. Williams, Jr.), was a member of the Hop Control Board and in 1952 he

participated in its deliberations which resulted in recommending that approximately 36 per cent of the crop be declared non-salable . . ." (R. 117).

ARGUMENT

The statement made by the Court (R. 119), upon which Respondent relies, is very plainly wrong. The testimony in this case is that the Hop Control Board did not determine or recommend that a particular percentage or portion of any crop be declared salable or non-salable. The function of the Board was to estimate and recommend to the Secretary of Agriculture the total pounds of hops the brewing industry could be expected to use during the coming year (R. 104, 105). At the time the estimate was made it could not be, nor was it related to or expressed as a percentage of the then growing crop.

Throughout the trial of this case and on brief (R. 14, 17) the Respondent attached great weight to the fact that the Secretary of Agriculture adopted the salable quantity recommended by the Hop Control Board without any material changes during the years the Board acted. When it is considered that the function of the Board was to estimate quantity of hops the industry could consume during the twelve-month period beginning September 1 of each year and that the rec

ommendation was adopted during the first month prior to the beginning of that twelve-month period, it is apparent that the Secretary would have little if any information or facts upon which to base a change in the quantity recommended by the Board and would of necessity accept the judgment of the Board (composed of members of the industry) regarding its requirements during the coming year. That the Secretary made no substantial change in the salable quantity of hops recommended by the Board, when viewed in its proper perspective, is determinative of nothing more than that the Secretary presumed that the brewers, growers, and dealers acting on the Board were more capable of estimating the quantity of hops required by the industry during the coming year than he. Respondent's assertion (Br. 17), that "it is crystal clear that the final determination of salable quantity by the Secretary did not vary substantially from the recommendation of the Board" (R. 17), does not transform salable *quantity* into salable *percentage*.

An estimate of the growing crop made as of July 1 was available to the Board and to the public at the time of the Hop Control Board meeting on July 17, 1952 (R. 106). This estimate was made two months before harvest and would of necessity be based solely upon vine growth to that time. There is uncontradicted testi-

mony in the record that an estimate of the growing hop crop made only one month prior to harvest was not reliable and could vary from 1 to 2 bales per acre (R. 78), or as much as 30 per cent under the crop harvested, and that an estimate was seldom over (R. 66). From this, it is evident that the estimated yield of the growing crop available to the Board at the time of its meeting would be of little, if any, value, and that as the witness testified, the total production "did not constitute any element whatsoever in that (the Board's) determination," (R. 57) of salable quantity. Respondent's witness testified that the determination of the total crop available (of which the salable *quantity* was ultimately expressed as a salable *percentage*) was not and could not be made, "until every last bale was weighed and every last unharvested acreage was estimated by the Board and the figures established" (R. 105, 106).[1]

Upon completion of this work (performed from October to December), the poundage recommended by the Board was then expressed by the Secretary of Agriculture as a proportion of the current crop that the growers would be permitted to sell.[2]

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[1] The witness, Robert H. Eaton, further testified that "when we are speaking in terms of the percentage, the final depends upon the final production" (R. 107).

[2] The first notice of a tentative salable allotment (percentage) of the 1952 crop was mailed to the growers some time during October, 1952 (R. 81). The final notice establishing the actual salable *percentage* of the 1952 crop was not forwarded to the growers until about December 15 (R. 108).

The Petitioner submits that the (Hop Control Board) recommendation of the quantity to be *sold*, made during July, could not affect the quantity of hops *harvested* from one to two months later; and that the *percentage* of the crop to be sold could be determined only after the *available quantity* was known. If therefor follows, the Board could not during July establish the percentage of the crop each grower would be permitted to sell.

The testimony in this case relating to the harvest of the crop, the time of its maturity, and the risk of loss was all directed to hops growing in the Willamette River area in Marion and Polk Counties in the State of Oregon (R. 39). The witnesses did not testify, nor is there any evidence in the record regarding the time of maturity or harvest of other hops growing east of the mountains in Oregon or in the States of Washington, Idaho, or California, all of which were subject to controls and to the order of the Secretary of Agriculture which established the salable quantity of hops produced during 1952 at 39,200,000 pounds, 17 F.R. 7187, (Petitioner's Br. 25). None of the witnesses testified regarding the dates of maturity, the risk of loss, harvesting conditions, or the dates of harvest of hops growing in any area other than in the immediate vicinity of the Mola Farm.

It is apparent that the Tax Court and the Respondent have considered the testimony of the witnesses regarding the maturity of hops during August and early September and the lack of any risk of loss subsequent to July 31, 1952, as applicable to all hops regardless of where grown. When considered in this light, it is apparent how the Tax Court, and Respondent as well, mistakenly assumed the July 17 meeting of the Hop Control Board in Portland, Oregon, and its recommendation of salable *quantity*, synonymous with and determinative of the salable *percentage* of the then growing crop which could ultimately be sold.

This Court can take judicial notice that the climatic conditions in Western Oregon are not similar to the climatic conditions in Eastern Oregon, or in the States of Idaho, California, or Washington, and that crops of like kind growing in each of these areas will not mature at the same time, nor will the risk of loss from disease on July 31 necessarily be the same in the different areas. From this and the preceding, it is obvious that the Hop Control Board could not possibly estimate or recommend the *salable percentage* of the hop crop growing at July 17, which the industry could use because it was not known at that time what the harvest in the various areas would be. The Hop Control Board could only recommend (as it did) the *salable quantity (in*

ounds) of hops the brewing industry could be ex-
ected to consume during the succeeding year.

The record contains no testimony or evidence to
ıpport Respondent's contention that at July 31, 1952,
) substantial a portion of the crop (35%) was known
) be unsalable and worthless unless retroactive effect
) July is given to the determination made by the
ecretary of Agriculture some three to five months
ter.[3]

In a footnote (Br. 14), Respondent argues that the
xpayer's calculation of 49 cents per pound is exces-
ve because of immaturity of the crop, and refers to
ie costs of harvest and the average sales price of the
op at a lesser figure in support of his contention. The
espondent has mistaken the Petitioner's contention
hich is that a price of 49 to 52 cents per pound of hops
July 31 was unreasonably low in view of the facts
hown at that date and that a grower would not sell at
ese prices or for any sum less than the costs of pro-
uction and care of the crop. Respondent's footnote
nores the testimony in this proceeding that difficulty

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[3] When asked regarding this, C. W. Paulus testified that the dealers and growers did not assume that the surplus percentage would be as high as finally designated, and that they figured that it would be at the most 25 per cent or even less than that, (R. 87, 88). The salable percentage for the year 1950 was 85%; for the year 1951, the salable percentage was 74%. It was stipulated and the Court so found that in both of these years, receipts from sales of hops exceeded the costs of growing and harvesting, (R. 31).

in the use of mechanical hop picking machines and the friable nature of the crop were the proximate causes of a yield of only five bales of hops to the acre during the year 1952 (R. 50), which resulted in an increase o harvest costs during 1952 over the normal experience anticipated. Neither of these factors could have been known at July 31.[4]

Elsewhere, the Respondent advances the argumen that it is "especially significant concerning value that as of the critical date, no contract had been consum mated for the sale of this crop" (Br. 12). This conten tion is refuted by the uncontroverted testimony tha the hops could have been contracted at the critical dat for delivery after harvest had the Petitioner been wil ing to sell (R. 46, 80); however, the Petitioner woul not sell at this price because it was too low (R. 48).[5]

The Respondent contended before the Tax Cou that Ralph E. Williams, Jr. (who managed the dec dent's financial affairs), as a member of the Hop Co trol Board participated in the meeting of the Board o

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[4] Respondent's Exhibit B (R. 111), establishes that during the year 1952 t hop growers in Oregon realized an average of 38 cents per pound for hops the vine (sales price *after deduction* of harvest costs), as compared to I spondent's contention here (Footnote Br. 14) of a sales value of from 30 35 cents per pound *before deduction* of harvest costs.

[5] Respondent's Exhibit B (R. 111), also establishes that Oregon hop grow realized an average sales price of 62 cents per pound during the year 19 Apparently the Petitioner was not alone in refusing to sell or contract for t sale of the hops at the bid prices in effect at July 31, 1952 (49 to 52 cents). is conceded that the Petitioner did later sell for a lesser figure. Such sales not, however, determinative of the value of the hops at a prior time as Respo ent implies (Footnote Br. 14).

July 17, 1952, at which time it was decided that a major portion of the then growing 1952 hop crop could not be sold; that as a result of this meeting, Williams knew that a loss would be sustained upon the subsequent sale of the 1952 crop and therefor liquidated the corporation and distributed the crop to the petitioner in order to obtain an offset against the Petitioner's other income (R. 54, 56, 58).

The Tax Court found that the Hop Control Board did at the meeting held July 17, 1952, recommend the salable *percentage* of the 1952 crop which could be sold (R. 119), and from this established that it was known to the Petitioner that one-third or more of the crop was not salable. The Court of Appeals is not bound by the findings of the Tax Court if that Court in appraising the situation used an improper yardstick as it did in the present instance; Riddlesbarger v. Commissioner, 200 F. 2d. 165, 171 (7th Cir. 1952).

In effect, the Court held that the Petitioner did not sustain the burden of proof although the Petitioner adduced testimony of a business purpose for liquidation (R. 55, 60), that the crop was worth the cost of production, and (assuming the facts in this case) that a grower would not sell for less than 30 cents per pound on the vine on July 31, 1952 R. 67, 68. The testimony

further establishes that Ralph Williams was aware that he could have obtained the entire crop as a deduction from income without question had there been a reason to so elect, R. 62, 63.

In view of the Court's erroneous finding that the Hop Control Board recommended the *salable percentage* of the growing crop (R. 119), it is not surprising that the inferences and conclusions drawn by the Tax Court from the evidence adduced at the trial substantially upheld the contention of the Respondent that the growing crop had only a nominal value and that the taxpayer's intent in liquidating Eola Farms, Inc. was to obtain a loss for tax purposes. This was error; Gillettes Estate et al. v. Commissioner 182 F. 2d. 1010 (9th Cir. 1950).

The Tax Court committed further error when it did not follow the rule for valuation of special properties set forth in its opinion (R. 118), and in effect imposed a penalty upon the taxpayer by placing a value upon the growing crop which, as pointed out in Petitioner's brief (Br. 19), represents a valuation based upon minimum bid price and yield and maximum harvest costs, subject to a reduction of salable crop much greater than the taxpayer had experienced theretofore.

In two comparatively recent cases involving the fir market value of property for estate tax purposes, te Court of Appeals for the Eighth Circuit commented pon the limits of the discretionary power of the Tax Court to determine the fair market value of property. I general, the Court ruled that the value fixed by te Court must be supported by substantial evidence. More specifically in the first case involving the valuation of a farm subject to gift taxes, the Court stated hat the Tax Court cannot arbitrarily ignore expert estimony where there is no evidence to refute it and he Tax Court has no knowledge or experience of its wn. *Cullers, Frances M. v. Commissioner*, 237 F.2d. 611 (8th Cir. 1956).

The second case decided by the same Court, October 30, 1956, involved the valuation of corporate stock certificates for estate tax purposes. The decision of the Tax Court was affirmed (with a strong dissent) because although there was expert opinion as to value, the Court held that the Tax Court was not bound by such testimony because there was other substantial evidence (financial statements of the corporation) upon which the Tax Court could base a determination, *Estate of Erica R. Fitts v. Commissioner*, 237 F. 2d. 729 (8th Cir. 1956).

That the Tax Court had no experience or specia knowledge of the subject matter (the growing hop crop in this proceeding, is apparent from the Court's mi understanding of the function of the Hop Control Boar and its finding that the recommendation of salabl quantity made by the Hop Control Board during Jul was synonymous with salable percentage determine by the Secretary of Agriculture some three to fi months later.

CONCLUSION

The judgment of the Tax Court should be reverse and the case remanded for a new trial because t Court misunderstood the function of the Hop Contr Board; as a result, the Court gave retroactive effect to July 3 1952, of subsequent events affecting the market val of the crop, and for the further reason that the Cou failed to apply the rule of "reasonableness and comm sense" which it said was determinative of the value the crop at July 31, 1952.

Respectfully submitted,

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